3829

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID B. DRISKILL, *Plaintiff in Error,*	}	No. ~~3839.~~
vs.		
THE UNITED STATES OF AMERICA, *Defendant in Error.*		

BRIEF OF PLAINTIFF IN ERROR

SPENCER B. PUGH,
Attorney for Plaintiff in Error.

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STATEMENT OF THE CASE

David B. Driskill, plaintiff in error, was indicted by the Grand Jury of the District Court of the United States for the District of Arizona on the 27th day of April, 1921, charged in one count with the possession of intoxicating liquor in violation of Section 3, Title 2, Act of Oct. 28, 1919, and in a second count with the transportation thereof, (Tran., p. 1). Trial was had on Oct. 29, 1921, and the jury returned its verdict of guilty as to the first count and not guilty as to the second. (Trans., p. 17.)

Thereupon the Court entered judgment and sentence that plaintiff in error pay a fine of Five Hundred Dollars and Ninety-Four Dollars costs. (Tran., p. 18.) Motion for new trial was filed and denied (Tran., p. 20), and writ of error sued out of this Court.

The intoxicating liquor for the possession of which the plaintiff in error was convicted consisted of seven pints of whiskey, nine pints of tequila and one gallon of other intoxicating liquor, all being stored in an outhouse upon premises belonging to plaintiff in error and under lease from him to a tenant and being under the joint occupancy of the landlord and the tenant, each using it for the storage of different articles from their dwellings. This outhouse was searched without any search warrant by several officers under the charge and direction of Fred Weage, Deputy U. S. Marshall, and E. B. Sisk, an agent of the Department of Justice, and the liquor procured as evidence.

Prior to the trial, plaintiff in error filed his petition, accompanied by his affidavit (Tran., p. 6), asking that said liquor be restored and that the officers be restrained from using same or any information secured from the search therefor, alleging that the outbuilding in which said liquor was found was in the joint possession and occupancy and use as a storehouse by plaintiff in error and his family and the tenant of the adjoining dwelling and premises; that the officers of the Government entered same

without the consent of plaintiff in error and without any search warrant therefor in violation of the constitutional rights of petitioner. Issue was taken by the Government by its answer denying the use of the said premises by petitioner as a storehouse in connection with his dwelling (Tran., p. 13), and the issue was tried as an issue of fact upon the trial. Objections were made to the admission of the liquor in evidence upon the grounds set out in the petition (Tran., p. 33), and at the conclusion of the testimony upon this issue (Tran. p., 81), the Court denied the petition and overruled the objections to the admission of such evidence. This was presented by motion for new trial (Tran., p. 21). Exceptions were taken and this action of the Court is one of the errors relied upon by plaintiff in error. (Tran., p. 101.)

At the close of the case for the Government, the plaintiff in error moved the Court for a pre-emptory instruction for the defendant upon the ground that insufficient evidence had been introduced to make out a primae facie case (Tran., p. 94), which motion was denied. This alleged error was presented to the Court on motion for new trial (Tran., p. 21), and as set out in Assignments 2 and 3 of the Assignment of Errors is the second ground of error relied upon by plaintiff in error,

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SPECIFICATION OF ERRORS

The specific errors relied upon and presented

by the plaintiff in error for reversal are as follows, each of such errors having been presented to the Trial Court by motion for new trial and set up in the Assignment of Errors, as set out in the foregoing Statement of the Case:

1. The Court erred in admitting in evidence certain bottles of intoxicatin liquor, being one bottle labeled as "Saffel", one bottle "Tequila" and a quantity of alleged "white mule,,' and any and all liquor, bottles and receptacles introduced in evidence in said cause, same having been objected to by the plaintiff in error upon the ground that same had been procured and obtained by the Government unlawfully from the home and premises and dwelling of the plaintiff in error without a search warrant as required by law and in violation of his Constitutional rights as set forth in his petition to restrain the use of the same as evidence.

2. That the Trial Court erred in overruling the motion of plaintiff in error made at the close of the case of the Government, to direct a verdict for the defendant upon the ground that the Government had failed to make out a primae facie case or introduce sufficient evidence to support a verdict of guilty.

ARGUMENT ON FIRST SPECIFICATION OF ERROR

Plaintiff in error contends that the testimony

introduced by the Government and the defendant, upon the issue presented by the defendant's petition to exclude the liquor upon the ground of unlawful search and the answer thereto, shows conclusively that the premises of the plaintiff in error were so connected with his dwelling as to come within the inhibition of unlawful search.

The contention is, (1) that the search was made by Government officers and under their direction, (2) that there was no consent thereto by the defendant, (3) that the outbuilding wherein the evidence was found was occupied by the plaintiff in error and his family as a necessary part of their dwelling, and (4) that there was no search warrant.

The Officers making the search included E. B. Sisk, agent of the Department of Justice, and Fred Weage, Deputy U. S. Marshall. They were in charge of Mr. Weage (Transcript. p. 61.)

There was no consent to the search, as shown by the testimony of the Deputy Marshall, who explains that the defendant objected and became abusive (Tran., p. 61). The witness does state (Tran., p. 62), that the wife of defendant stated that she had no objection to the search. However, it is held in Amos vs. U. S., 255 U. S. Rep. 313, that the wife can not waive the constitutional right of the husband in this respect.

The proof that the premises from which the incriminating evidence was taken was a part of the dwelling of the plaintiff in error and his family is

conclusive. W. H. Luttner testifies that the possession of this building was a joint possession between himself as tenant of the adjoining premises and of Driskill, each to use it as a place of storage. (Tran., p. 46.) Mrs. W. H. Luttner testifies that Driskill put up the garage and told her that they could use it with him and that Driskill had been using it ever since that time as a storage room (Tran., p. 40). Driskill, plaintiff in error, testifies that he put up the garage and that it was arranged that the Luttners might use it along with his family and that no specific corners were allotted to either and that each family put their stuff in there (Tran., p. 50). The same place was referred to by Mrs. Driskill as the "backshed". No other witness testified as to the ownership or occupancy of this outbuilding or garage.

That there was no search warrant for these premises is admitted by all the Government witnesses. While the officers went to the Driskill home with a search warrant, the house was wrongly numbered, and the Deputy Marshall Weage states that same was not served. He states (Tran., p. 62), "So I called by assistants off, told them I could not serve that warrant, as a mistake had been made in the warrant."

The Trial Court, judging by his remarks upon the denial of plaintiff in error's motion to exclude this evidence (Tran., p. 81), seems to have wrongfully assumed that this search and discovery was

not made by Government representatives, notwithstanding the conclcusive testimony above quoted on that point. The Court further stated in the opinion (Tran., p. 82), that in his opinion "the garage in which these articles were found was not a part of the premises of the defendant:", though as above shown every witness testifying on that point stated the contrary. The Trial Court further states as one of the grounds for his decision that there is no evidence that the "defendant claims this to be his property,,' (Tran., p. 83), though the decisions have been to the effect that the defendant has the right to assert under the 4th Amendment to the Constitution as the use of such evidence compels him to be an unwilling witness against himself and that the claim to the property so taken is not essential to the prevention of its use as evidence. U. S. vs. Slusser, 270 Fed. 818. Gouled vs. U. S., 255 U. S. Rep. 298, Amos vs. U. S., 255 U. S. Rep. 313. And the Trial Court as a further ground for such ruling states (Tran., p. 84), in substance, that the defendant had failed to assert his constitutional right until after the case had been pending for several months and had been set for trial. Yet the U. S. Supreme Court held in the case of Amos vs. U. S., that such a motion was not too late when made even after the jury had been sworn to try the case.

It seems to us that in view of the overwhelming evidence in favor of the defendant upon these points, and the misapprehension of the Court as to the facts

proven and the law as laid down in the cases above cited, the motion should have been sustained and the evidence excluded.

ARGUMENT ON SECOND SPECIFICATION OF ERROR

The motion of plaintiff in error for an instructed verdict was made at the close of the Government's case and also at the close of all the evidence in the cause. The Court having held, in his decision denying the motion to exclude the introduction of the liquor in evidence, that "the garage in which these articles were found was not a part of the premises of the defendant: they belonged to the premises which had been leased to another party," it becomes interesting to note what new evidence is introduced in that behalf or to connect the defendant with the possession of the liquor with the possession of which he was convicted.

Certainly, to justify the Court in submitting this matter to the jury, there must have been either a finding of this liquor on defendant's premises under conditions from which a reasonable inference could be drawn that he had knowledge of it, or, if not on his premises, some showing of personal possession by him.

The only evidence counsel can find in the transcript as to any personal connection of the defend-

ant, or which could by any reasonable flight of the imagination be construed as personal connection, is in the bill of exceptions No. 1 (Tran., p. 34), in the testimony of Sisk in which he says: "I looked across into the garage across the alley from the defendant's premises, and the defendant was stooping, had hold of a trunk, and in the act of pushing it back into a corner." There was nothing to show this was the trunk containing liquor, and it was admitted and claimed all through the trial that the defendant did store property here as well as others.

Bill of Exceptions No. 2 contains nothing whatever in addition to the above mentioned testimony of Sisk, which is repeated on the main issue, and counsel submits that there is nothing in this record in the way of testimony to submit to the jury; nothing to show the possession of this liquor by the defendant to the exclusion of other persons; nothing to warrant the Court in submitting or to sustain the verdict of the jury.

GENERAL ARGUMENT

The record shows, when read in the light of human experience, that the plaintiff was convicted of this crime because an array of bottles of intoxicating liquor was admitted in evidence and placed before the jury with the testimony that they were procured at the time of the arrest of the defendant

from a garage in or near his premises. In admitting this evidence the Court ruled as a matter of law that the premises were not that of the defendant. Then, without additional substantial testimony, the Court submitted to the jury the question of the defendant's possession of the liquor.

It seems that the case of the Government was such that in order to excuse an unlawful search it was held to have proven that the illegal articles were not in the possession of the defendant or in premises with which he had any thing to do or over which he had any control; and in order to have the cause submitted to the jury, the Court in effect held, and must necessarily have held in order to make an issue for the jury, that the possesison was that of the dedenfant. We submit that both of these contentions can not be true; that if one is true, then it must follow that the other is false.

We therefore submit that the Court erred in denying the defendant's motion to exclude the illegal articles from the evidence and in submitting the matter to the jury at the close of the Government's case, and respectfully submit that the cause should be reversed, with direction that it be dismissed or other appropriate order.

Respectfully submitted,

SPENCER B. PUGH,

Attorney for Plaintiff in Error.